

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>AMERICAN FEDERATION OF STATE, COUNTY,</b>	:	
<b>AND MUNICIPAL EMPLOYEES, COUNCIL 81,</b>	:	
<b>Local 459, AFL-CIO,</b>	:	
	:	<b>ULP No. 15-09-1010</b>
Charging Party,	:	
	:	<b>PROBABLE CAUSE DETERMINATION</b>
<b>v.</b>	:	
	:	
<b>NEW CASTLE COUNTY, DELAWARE,</b>	:	
	:	
Respondent.	:	

**BACKGROUND**

New Castle County, Delaware (County) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA).

The American Federation of State, County and Municipal Employees, Council 81 (AFSCME), is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 459, AFSCME is an exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j). AFSCME Local 459 represents the bargaining unit of County employees which includes mechanical, maintenance and trade personnel. *DOL Cases 11, 42, 68, and 70.*

The County and AFSCME are parties to a collective bargaining agreement for this bargaining unit which has a term of April 1, 2013 through March 31, 2015.

On September 24, 2015, AFSCME filed an unfair labor practice charge with the Public Employment Relations Board (PERB) alleging conduct by the County in violation of 19 Del.C. §1307 (a)(1), (a)(5) and (a)(6), which state:

(a) It is an unfair labor practice for a public employer or its designated

representative to do any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject;
- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

AFSCME alleges the County violated its obligations under the PERA by failing and/or refusing to provide information requested by the union which is necessary and relevant to performance of its representational duties.

On October 5, 2015, the County filed its Answer to the Charge, denying AFSCME's conclusions that it had violated the PERA. The County included in its Answer New Matter in which it asserted AFSCME had failed to meet its initial burden of establishing the relevance of the requested information. It also requested further action on this Charge be stayed, pending exhaustion of the grievance process.

AFSCME filed its response to the County's New Matter on October 13, 2015, in which it denied the factual and legal positions set forth therein.

This probable cause determination is based upon a review of the pleadings submitted in this matter.

### **DISCUSSION**

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and,

if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of determining whether probable cause exists to support an unfair labor practice charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE.PERB, 2004).

It is well established that the duty to bargain in good faith under the Public Employment Relations Act obligates a public employer to provide information to an exclusive bargaining representative that is necessary and relevant to that organization in performing its representational duty. *AFSCME 320 & 1102 v. City of Wilmington*, ULP 10-08-761, VII PERB 4757, 4760 (Probable Cause Determination, 2010). This obligation has been recognized by this Board, the Court of Chancery and the Delaware Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA*, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed Colonial Education Assn. v. Bd. of Education*, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District*, Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986)); *AAUP v. DSU*, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001), *AFSCME Locals 1007, 1267, 2888, v. DSU*, Del.PERB, ULP 10-04-739, VII PERB 4693, 4705 (2010); *ATU Local 842 v. DTC*, ULP 12-02-850, VII PERB 5493, 5497 (Probable Cause Determination, 2012). The union's representational duties include not

only collective bargaining, but also enforcement of the resulting agreement through the negotiated grievance procedure.

Section §44 (b) of the negotiated collective bargaining agreement states:

- (b) An employee may request that the Chief Human Resources Officer review the employee's classification. The General Manager shall, within fifteen (15) work days, submit his/her comments, if any, to the Chief Human Resources Officer. Any employee alleging improper classification based upon the duties and responsibilities as set forth in the class specification then effective, if not corrected, shall have the right through the Union to submit a grievance at Step Two of the Grievance Procedure provided a prior classification review request has not been filed within three (3) months.

It is undisputed that AFSCME filed a grievance contesting the County's denial of a position reclassification for the TV/Grouter Equipment Operator positions in August, 2015.

AFSCME requested the County provide two types of information and stated the basis for its request:

The Union is presently investigating an issue regarding the upgrades within the bargaining unit for the position of TV/Grouter Equipment Operator. So that the Union can properly represent its members and enforce the collective bargaining agreement, please provide the following information:

- (a) A list of all upgrades/promotions in Special Services based on additional job duties made since January 1, 2010; including the name of the employee, the name of the job position, the additional job duties considered, and whether the upgrade was as a result of a PCQ.
- (b) Include history of revisions for the position of TV/Grouter Equipment Operator from the time it was established on 07/01/1973 through the last revision on 7/2/2002. *Charge Exhibit C.*

A request for information must be made in good faith and the response to that request must also be made in good faith. When requesting information, the union has the initial burden to establish the relevance of the requested information. Although "the burden is not exceptionally heavy", there must be some proffer as to relevance.<sup>1</sup> Once the presumption of relevance is

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<sup>1</sup> *Boise Cascade Corporation and the United Paperworkers International Union, Local 900*, 279 NLRB 422 (NLRB 1986)

established, the burden shifts to the employer to respond in good faith in a reasonable and prompt manner.<sup>2</sup> The parties remain under a good faith obligation to attempt to resolve any issues concerning the scope of the request and/or method of production. *AFSCME, AFL-CIO Council 81, Locals 320 & 1102 v. City of Wilmington, Delaware*, ULP No. 10-08-761, VII PERB 4867, 4882 (2011).

It appears from the documents appended to the County's Answer that it complied with subsection (b) of AFSCME's request. *Answer Exhibit A*. The County argues AFSCME's request for "a list of all upgrades/promotions in Special Services based on additional job duties made since January 1, 2010" (i.e., subsection (a) of the request) is 1) unrelated to August 4, 2015 grievance; 2) concerns positions which are not in the Local 459 bargaining unit; and/or 3) is unduly burdensome because it seeks information for the preceding five year period. Consequently, it argues, the Charge should be dismissed because AFSCME has failed to establish the relevance of this material.

On its face, the requested information in subsection (a) is limited to upgrades and promotions in the relevant department. It appears to request information which would allow union to effectively evaluate whether a grievance would have a reasonable chance of success. For this reason, a record is necessary to evaluate both AFSCME's charge and the County's response.

The County requested the processing of the unfair labor practice charge be stayed pending exhaustion of the grievance procedure. To require the grievance to proceed without permitting AFSCME access to information which is potentially relevant to its evaluation of the merits of that grievance is counterintuitive. For this reason, the County's request is denied.

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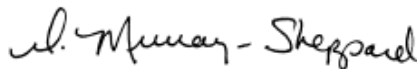
<sup>2</sup> *Tower Books*, 273 NLRB 671 (1984).

## **DETERMINATION**

Considered in their entirety and in a light most favorable to Charging Party, the pleadings are sufficient to constitute probable cause to believe that an unfair labor practice, as alleged, may have occurred.

A hearing will be scheduled forthwith for the purpose of developing a factual record and receive argument on which a determination can be made as to whether the County has failed or refused to provide information which is relevant and necessary to the union in performing its representational responsibilities under the Public Employment Relations Act, as alleged, in violation of 19 Del.C. §1307 (a)(1), (5), and/or (6).

DATE: November 3, 2015



DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.